No. 11,418

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LAWRENCE WAREHOUSE COMPANY (a corporation), *Appellant*, vs. DEFENSE SUPPLIES CORPORATION, *Appellee*.	
CAPITOL CHEVROLET COMPANY (a corporation), *Appellant*, vs. DEFENSE SUPPLIES CORPORATION, *Appellee*.	
V. J. McGREW, *Appellant*, vs. DEFENSE SUPPLIES CORPORATION, *Appellee*.	
DEFENSE SUPPLIES CORPORATION, *Appellant*, vs. CLYDE W. HENRY, *Appellee*.	

BRIEF FOR APPELLEE, DEFENSE SUPPLIES CORPORATION, IN REPLY TO BRIEFS FOR APPELLANTS, LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY AND V. J. McGREW.

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JURISDICTIONAL STATEMENT.

This is a civil action. The amount in controversy exceeds $3,000 exclusive of interest and costs.

The jurisdiction of the District Court was conferred by reason of the amount in controversy and by reason of Sections 41(1) and 42 of Title 28 of the United States Code, the Government of the United States being the owner and holder of more than one-half of the capital stock of appellant Defense Supplies Corporation, a federal corporation created by and organized under an act of Congress of the United States. (Complaint, Tr.* pp. 3 and 4.)

This Court has jurisdiction on appeal under Section 225, Subdivision (a), Subsection First, Title 28, United States Code.

STATEMENT OF THE CASE.

A. THE FACTS.

Appellee Defense Supplies Corporation, a corporate agency of the United States, in 1943 initiated and prosecuted a plan known as the "Idle Tire Purchase Plan", the purpose of which was to create a stock pile of used and new automobile tires and tubes in aid of the National Defense Program. On March 1, 1943, it entered into a contract with appellant Lawrence Warehouse Company, a corporation engaged in the warehousing business, for the storage and safekeeping of the tires and tubes that had been accumulated in Sacramento, California. Lawrence Warehouse Company with the consent and approval

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*Throughout this brief the designation "Tr." refers to the printed transcript of the record on appeal.

of appellee Defense Supplies Corporation in turn contracted with appellant Capitol Chevrolet Company, a corporation, to warehouse the tires and tubes as the agent for Lawrence.* Capitol Chevrolet Company, in furtherance of the plan for storage and safekeeping of the tires and tubes, leased from appellee Clyde W. Henry and Constantine Parella a building owned by them near the City of Sacramento, California, formerly used as an ice skating rink, and commonly known as the Ice Palace.

On April 9, 1943, appellant V. J. McGrew, who was engaged in the drilling of a water well for Clyde W. Henry, entered the engine room of the Ice Palace for the purpose of removing therefrom a steel tank owned by Henry. He was assisted in the work of removing the tank by Charles Elmore, an employee of Henry. The steel from the tank was to be used by McGrew in lining the water well which he was drilling for Henry. While McGrew was using an acetylene torch in cutting up the steel tank, a fire started in the engine room and spread to the main building where the tires and tubes were stored, and all of the tires and tubes were destroyed by the fire.

Appellee Defense Supplies Corporation filed suit for the loss sustained as a result of the fire, in the United States District Court for the Northern District of California, Southern Division, against Lawrence Warehouse Company, Capitol Chevrolet Company, Clyde W. Henry,

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*Throughout this brief appellants Lawrence Warehouse Company, Capitol Chevrolet Company and V. J. McGrew will sometimes be referred to as "Lawrence", "Capitol" and "McGrew", respectively, and appellee Clyde W. Henry will sometimes be referred to as "Henry", for convenience. The word "appellee" will refer to appellee Defense Supplies Corporation unless the name Clyde W. Henry is used with it.

Constantine Parella, V. J. McGrew, and Charles Elmore. (Tr. p. 3, et seq.) On the trial at the close of plaintiff's case the action was dismissed as to the defendants Constantine Parella and Charles Elmore without opposition by appellee. (Tr. pp. 307, 308.) The other defendants then moved for dismissals and the case was submitted on these motions, no evidence on behalf of any of the defendants having been offered. The trial Court gave judgment in favor of Defense Supplies Corporation against defendants Lawrence Warehouse Company, Capitol Chevrolet Company, and V. J. McGrew. Each of these defendants has appealed to this Court. The trial Court granted the motion of defendant Clyde W. Henry and gave judgment of dismissal in his favor. Appellee Defense Supplies Corporation has appealed from this judgment and this appeal is now pending herein. (See separate briefs for appellant Defense Supplies Corporation and appellee Clyde W. Henry.)

On February 28, 1947, the Court, on stipulation of the parties, ordered the consolidation of the appeals of appellants Lawrence Warehouse Company, Capitol Chevrolet Company and V. J. McGrew, for briefing purposes and authorized appellee Defense Supplies Corporation to file a single brief in answer to all opening briefs of said appellants. This is the reply to the briefs of each of said appellants.

B. THE ISSUES RAISED BY THE APPELLANTS.

1. Issues raised by appellant Capitol Chevrolet Company.

The brief of appellant Capitol Chevrolet Company sets forth four specifications of error upon which the appel-

lant relies. These specifications of error raise the following issues:

(a) That Capitol is not liable to appellee as a matter of law because an agent is not liable to a third person for a violation of its duty to its principal.

(b) That the evidence is insufficient to support the finding of negligence on the part of appellant Capitol Chevrolet Company.

(c) That in any event appellee Defense Supplies Corporation was guilty of contributory negligence.

(d) That the amount of damages fixed by the Court is not supported by the evidence.

2. Issues raised by appellant Lawrence Warehouse Company.

(a) That the evidence is insufficient to support the finding of negligence on the part of the appellant Lawrence Warehouse Company.

(b) That the evidence is insufficient to support the finding that the fire and loss of the appellee's goods was proximately caused by the negligence of Lawrence Warehouse Company.

3. Issues raised by appellant V. J. McGrew.

The specifications of error contained in this appellant's brief state in different ways the single issue raised by him. That issue is that the evidence is insufficient to support a finding that the fire and loss of appellee's goods were caused by the use of the torch by McGrew. We believe that this Court cannot hear the appeal of this appellant because it was filed too late. However, we include a brief

discussion of the issue raised with the thought that it may be of assistance to the Court in deciding the case as a whole.

ARGUMENT ON CASE AGAINST CAPITOL CHEVROLET COMPANY.

1. APPELLANT CAPITOL CHEVROLET COMPANY IS LIABLE TO APPELLEE FOR THE LOSS SUSTAINED AS A RESULT OF CAPITOL'S NEGLIGENCE.

Capitol cannot escape liability by virtue of the fact that it was acting as agent for Lawrence Warehouse Company. It is true that the Courts sometimes speak of the principle that an agent is not liable to third parties for a violation of its duty to the principal. This is true, however, only where there has been no breach of a duty to the third party. In the present case the goods of appellee were entrusted to Capitol and it owed a duty to appellee to use due care for the protection of its goods. In such cases where loss results from the negligent act or omission of the agent, the agent is liable. This was pointed out by the trial Court in its opinion. (Tr. p. 73.) Thus, in the case of *E. N. Emery Co. v. American Refrigerator Transit Co.,* 189 N. W. 824 (Ia.) which is one of the cases cited by the trial Court, the Court stated as follows:

> "* * * The question involved is an old one concerning which there is much conflict of authority. The difficulty lies in determining whether the agent owes a duty to a third person. Liability is predicated on duty. If the agent is put in control of the situation with the express or implied consent of the principal, or is given or exercises such powers within his au-

thority that an independent actor would have, it is quite generally held that he owes a duty to third persons to use due care in what he does, the same as any other individual. Such a control of property imposes upon him a duty, not altogether and simply as agent, but as a custodian and controller of such property for the purposes in hand. The fact that he also owes a special duty to his principal is not material." (p. 828.)

The general rule has been stated by Professor Mechem as follows:

"So if an agent or servant, while acting upon his master's business, so negligently acts as to cause direct and immediate injury to the person or property of a third person, whether he be one to whom the master owes a special duty or not, under circumstances which would impose liability on the agent or servant, if he were acting under the same conditions on his own account, he will be personally liable. * * *" 1 *Mechem on Agency,* 2d ed. sec. 1460.

See also 3 *C.J.S.* 130, Sec. 221, and the cases there cited.

Professor Mechem points out that in many cases it is more convenient to proceed against the principal but that this does not mean the agent is not liable. See 1 *Mechem on Agency,* 2d ed., sec. 1460, p. 1082, where it is said:

"* * * The liability of the servant is the direct and primary one; that of the master is a secondary and imputed one. In actual practice, the liability of the servant or agent is usually ignored because it is more convenient or effective to pursue the master, but the servant's liability nevertheless exists. * * *"

Here Capitol Chevrolet Company has undertaken the storage and protection of goods and has failed to protect them. It cannot escape liability on the ground that it was acting only as an agent.

2 *Restatement of the Law of Agency,* sec. 354.

The fact that Capitol may not have had complete control of the goods to the exclusion of its principal is not material so long as its control extended to the cause of the loss.

Giles v. Moundridge Milling Co., 173 S. W. (2d) 745 (Mo.).

2. **THERE IS SUBTANTIAL EVIDENCE TO SUPPORT THE FINDING OF NEGLIGENCE ON THE PART OF CAPITOL CHEVROLET COMPANY.**

Appellant Capitol Chevrolet Company next argues that there is no evidence to support the finding of negligence on its part. It bases its argument in this respect on the contention that the evidence discloses the following factors which operate to relieve Capitol of all responsibility:

A. The evidence discloses that the appellee itself selected and approved the premises where the goods were stored.

B. The premises were properly equipped with fire-fighting equipment.

C. Appellee had undertaken a "joint custodianship" with Lawrence Warehouse Company for the storage of the goods.

In answer to Capitol's argument we will take each alleged factor in the above order.

A. The fact that appellee approved the premises as fit for the storage of the tires and tubes cannot relieve Capitol from the duty to exercise due care. It is true, as Capitol points out in its brief, that appellee authorized it to use the premises for storage purposes and appellee's counsel so stipulated at the trial. (Tr. p. 111.) This perhaps would relieve Capitol from responsibility if the loss had been caused by reason of a known defect in the premises. It cannot operate, however, to permit Capitol to be careless in its protection of the goods. Here the loss was caused by the use of an actylene torch on the premises. It was Capitol who permitted the use of the torch and failed to take proper precautions under the circumstances. There is nothing in the evidence to indicate that appellee approved either the use of the torch or the precautions taken, and no such contention is made. We know of no authority, and none is cited, which supports Capitol's proposition that approval of the premises by a bailee will make proper safeguarding of the stored goods by the bailor unnecessary.

B. There is no evidence that the premises were properly equipped with fire-fighting equipment under the circumstances. Capitol argues that because the evidence shows that there was a hydrant at each corner of the building the premises were properly equipped and Capitol was not negligent in this respect. Capitol then argues that no one testified that the hydrants were not available or properly equipped. Appellee did not have the burden of proving Capitol's case. The evidence shows that the hydrants were not used at the start of the fire, and also that there was no fire-fighting equipment in the room

where the fire started other than a five-gallon bucket of water placed there by the workmen who used the torch. (Tr. p. 219.) The bucket was in fact ineffectual to put the fire out. No evidence was offered by any of appellants to show that the equipment was proper or that the precautions taken were such as would have been taken by a reasonably prudent man under the circumstances.

When it is shown that the bailed goods were destroyed by a cause within the control of the bailee, an inference of negligence is raised which places the burden on the bailee to show the exercise of due care on its part.

Thus, when the goods are destroyed by fire and it is shown that the fire was started by a means or in a place under the control of the bailee, then the bailee is liable, unless it shows by affirmative evidence that it used due care.

Lake Union Dry Dock & Machine Works v. U. S., 79 Fed. (2d) 802 (C. C. A. 9);

Newport News v. U. S., 34 Fed. (2d) 100 (C. C. A. 4);

Lindor v. Burns, 10 N. E. (2d) 686 (Ill.);

Gulf Insurance Co. v. Temple, 187 So. 814 (La.);

Royal Insurance Co. v. Collard Motors, 179 So. 108 (La.);

Walter v. Sanders Motor Co., 294 N.W. 621 (Iowa);

Walters v. Adams Transportation & Storage Co., 141 S.W. (2d) 205 (Mo.).

See also the comments in 8 *C. J. S.* 348-9. It is there pointed out that some recent cases go further and hold that the bailee must show lack of negligence even where

there has been no showing that the cause was within the bailee's control.

The California cases support the general rule and hold that a bailee must produce evidence of lack of negligence on its part.

Wilson v. Crown Transfer & Storage Co., 201 Cal. 701;

Runkle v. Southern Pacific Milling Co., 184 Cal. 714;

Atwood v. So. Cal. Ice Co., 63 Cal. App. 343;

Travellers Fire Ins. Co. v. Brock & Co., 30 Cal. App. (2d) 112;

U Drive & Tour v. System Auto Parks, 28 Cal. App. (2d) (Supp.) 782;

England v. Lyon Fireproof Storage Co., 94 Cal. App. 562.

In the *Runkle* case, supra, the Court said, at page 721:

> "While it was incumbent upon the plaintiff to sustain the burden of showing defendant's negligence, it was not necessary to the plaintiff's case to show affirmatively what would constitute ordinary care on the part of the defendant in the operation and management of its warehouse. That was a matter of defense, and in the absence of a showing in that behalf by the defendant it was within the province of the jury to determine from all of the evidence whether the defendant was negligent in the management of its business or conducted it with the care and caution which would, considering the character of the business, ordinarily be required of a reasonably prudent person."

In the present case the cause of the destruction of plaintiff's goods has been shown, but there is no showing that proper precautions against the origin and spread of

the fire were taken. Here the plaintiff has gone further and has shown additional facts indicating negligence on the part of the bailee. For instance the evidence shows that there was no fire-fighting equipment in the room where the fire started, other than a five gallon bucket of water taken there by the workmen. (Tr. p. 219.) It also shows that the workmen were permitted to go on the premises in violation of the expressed written instructions of the plaintiff. (Plaintiff's Exhibits 9, 10 and 13, Tr. pp. 339, 340 and 350.) The fact that such additional circumstances are shown, however, should not relieve the warehouseman or its agent from the necessity of showing that adequate precautions against fire were taken. As the evidence stands, they took no precautions whatever in spite of the fact that they permitted an extremely hot flame to be used in a frame building close to where inflammable rubber was stored.

It has been held that the use of an acetylene torch near inflammable material is itself negligence.

International SS Co. v. Fletcher Co., 296 Fed. 855 (C. C. A. 2).

It has also been held that the use of such a torch without examining the premises for inflammable material and taking customary safeguards against fire is gross negligence.

U. S. v. Todd-Engineering Dry Dock Co., 53 Fed. (2d) 1025 (D.C. La.);

Lancashire Shipping Co. v. Moore Dry Dock & Repair Co., 43 Fed. (2d) 750 (D.C. N.Y.).

And it has been held in a number of cases that the use of an acetylene torch on the bailee's premises renders the

bailee liable for the resulting damage to the bailor's property in the absence of affirmative evidence that proper and customary precautions were taken.

Lindor v. Burns, 10 N.E. (2d) 686 (Ill.);
Gulf Insurance Co. v. Temple, 187 So. 814 (La.);
Olsen Water & Towing Co. v. U. S., 21 Fed. (2d) 304 (C. C. A. 2);
Tide Water Oil Co. v. Brewer Dry Dock Co., 54 Fed. (2d) 139 (D.C. N.Y.).

C. There is no evidence of a "joint custodianship". Capitol's argument in this respect is with the apparent purpose of showing that it had no control over the appellee's goods, and that, therefore, it should not be held responsible for their loss. The evidence is clear, however, that the obligation of caring for the goods rested in Capitol, the actual custodian. The relationship between the parties is set forth in written agreements admitted in evidence. (Plaintiff's Exhibit 1, Tr. p. 310, and Plaintiff's Exhibit 11, Tr. p. 341.) The provisions of these agreements are clear. Appellant Lawrence Warehouse Company agreed to store the tires and tubes delivered to it by Defense Supplies Corporation at a fixed charge per tire or tube, and further agreed that its "general responsibility for the care and protection of the tires will be limited to such care as is required by laws governing warehouses in [its] state and to the exercise of ordinary care on [its] part." Appellant Capitol Chevrolet Company agreed with appellant Lawrence Warehouse Company to receive such tires and tubes as may be delivered to it for the account of Lawrence Warehouse Company and "to store and safeguard the storage of such tires and

tubes as are received by Capitol Chevrolet Company." Capitol attempts to infer from the evidence a different relationship than is set forth in the written agreements and seldom mentions the agreements themselves. It is our opinion that the written agreements can not be avoided in this manner and in fact appellant makes no argument and cites no cases in support of its position in this respect. It tries to avoid the agreements by ignoring them.

In attempting to show that appellee had control over the premises, Capitol emphasizes the arrangement made with Burns Detective Agency. Appellee requested Lawrence Warehouse Company to install a 24-hour guard service at the premises, and accordingly Lawrence Warehouse Company arranged with Burns Detective Agency for this service. Capitol contends that the Burns guards were employees of appellee. In support of this contention it relies on a statement made by counsel for appellee at the trial. This statement is as follows:

> "We will stipulate that the guards were employees of the Burns Detective Agency; that arrangements were made with the Burns Detective Agency by the Lawrence Warehouse Company at the request of the Defense Supplies Corporation; that the Burns Detective Agency was paid by Lawrence Warehouse Company, and that Defense Supplies Corporation reimbursed the Lawrence Warehouse Company for the cost of the guard service. Is that correct?" (Tr. p. 285.)

We think that the statement sets forth clearly the true arrangement and certainly can not give rise to an infer-

ence that the guards were employees of appellee. Furthermore, Kissell, one of the Burns guards, testified that he permitted the workmen to enter the premises *upon orders from Capitol Chevrolet Company.* Kissell testified as follows (Tr. p. 280):

> "Q. You say there was an order. What do you mean by that?
>
> A. There was an order came from the Capitol Chevrolet Company permitting Mr. Henry to remove this stuff from the engine room.
>
> Q. Did that appear in your book of instructions, or whatever you kept there?
>
> A. That was our orders, not to let anything be moved from the premises unless there was an order from the Capitol Chevrolet Company."

Also, Mr. Gordon Kendon, the assistant manager of Capitol Chevrolet Company, testified that he gave the workmen permission to enter the premises. In the face of this testimony it seems idle for Capitol to argue that it had no control over the premises. It clearly appears that Capitol was in control and was directly responsible for permitting the use of the torch.

Capitol further contends that the evidence shows that appellee had control over admissions to the premises and such control was sufficient to relieve Capitol from responsibility.

It is true that appellee authorized certain persons to enter the premises. (Plaintiff's Exhibit 10, Tr. p. 199.) This is not inconsistent with a bailor-bailee relationship. In the ordinary bailment case the bailee has the right to designate the persons other than the bailor to whom the

goods are available for inspection or removal. The difficulty with Capitol's position is the conclusion that this right on the part of the bailee is inconsistent with the right of the bailor to care for the stored goods, for there is no such inconsistency. There is nothing in the evidence to indicate that appellee assumed any control over the safeguarding of the goods from loss by fire to the exclusion of the custodian of the goods. The record is devoid of evidence to indicate that Capitol could not take whatever precautions it deemed advisable to protect the goods from fire.

Capitol's position is a unique one. It had agreed to store and safeguard the goods, and now seeks to avoid liability on the ground that it was not storing the goods at all because it had no control over the premises. One is tempted to ask, "What was Capitol being paid for?" Certainly the fact that appellee requested guard service and authorized certain persons to enter the premises does not show that appellee had such exclusive control over the care of the goods as would relieve Capitol from responsibility.

3. APPELLEE WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

The fact that appellee approved the storage site and requested the guard service can not, as Capitol contends, prevent recovery by appellee, because even assuming that these acts constitute negligence, which we do not admit, they had nothing whatever to do with the cause of the loss. It is elemental, of course, that in order that the negligence of plaintiff may release defendant from lia-

bility such negligence must contribute proximately to the injury complained of.

19 *Cal. Jur.* 649, Section 78.

Here the causes of the loss were the use of a torch, and the failure of Capitol to take proper safeguards. Appellee had nothing to do with these acts. It knew nothing of the use of the torch until after the fire, and did nothing to approve the use or to prevent the taking of proper safeguards.

Capitol cites in its brief some early cases from other jurisdictions purporting to hold that where a bailor has knowledge of conditions under which the goods are stored he can not recover for the loss due to such conditions. This may be true where the injury is caused by a defect in the premises known and approved by the bailor. Such knowledge, however, can not operate to relieve the bailee from liability for its negligence in the care of the goods.

Runkle v. So. Pac. Milling Co., 184 Cal. 714.

In the *Runkle* case there was inadequate fire-fighting equipment in view of the nature of the warehouse and the goods stored therein, and as a result plaintiff's goods were destroyed by fire. The Court there said, at page 717:

> "* * * The liability of the defendant as a bailee for hire was not lessened and the plaintiff was not estopped from asserting such liability merely because the plaintiff may have had knowledge as to the manner in which the defendant conducted its business at the time plaintiff stored his beans with the defendant. (Stevens v. Stewart-Warner Corp., 223 Mass. 44 [111 N.E. 771].)"

4. **IN ANY EVENT THE ARGUMENT OF CAPITOL ON THE SUFFICIENCY OF THE EVIDENCE MERELY GOES TO THE WEIGHT OF THE EVIDENCE AND THE NEGLIGENCE OF APPELLANTS IS A QUESTION OF FACT FOR THE DETERMINATION OF THE TRIAL COURT.**

Capitol's argument on the sufficiency of the evidence is in essence merely this: That the trial Court should have drawn a different inference from the evidence than it did. It is clear, however, that the evidence is susceptible of the inference of negligence on the part of the warehouseman, and the question of negligence is therefore one of fact for the determination of the trial Court. The case of *Runkle v. So. Pac. Milling Co.,* 184 Cal. 714, mentioned above, is a case strikingly similar to the present one. There the goods of plaintiff were destroyed by fire while stored in defendant's warehouse, and it was contended that the defendant was negligent in not taking proper precautions. The Court there said, at page 717:

> "* * * It is idle to discuss upon appeal to this court the weight of the evidence upon which the judgment rests, and, of course, it is only when the facts of a given case are not in any event or in any view of the case susceptible to the inference of negligence sought to be deduced therefrom that the question of negligence becomes one of law for the sole consideration of the court rather than one of fact for the determination of the jury * * *"

After stating that inflammable substances were stored in a wooden structure and pointing out the nature of the fire-fighting equipment the Court in the *Runkle* case stated as follows:

> "* * * Whether these fire-fighting appliances were ordinarily adequate and reasonably sufficient as a pro-

> tection against loss and damage by fire under all of the circumstances, and considering particularly the situation of the warehouse, was clearly a question of fact for the jury to determine * * *'' (p. 717).

See also *Charles Nelson Co. v. Pacific Wharf & Storage Co.*, 58 Cal. App. 347.

It is submitted that it is not within the province of this Court to weight the evidence and redetermine the question of negligence, which is a question of fact.

5. THERE WAS SUFFICIENT COMPETENT EVIDENCE TO SUPPORT THE AMOUNT OF DAMAGES FIXED BY THE COURT.

Appellant Capitol Chevrolet Company argues in its brief that the Court erred in the admission and exclusion of evidence relating to the number and value of the automobile tires and tubes destroyed by the fire; that there was no support in the evidence for Finding II of the findings of fact as to the quantities of tires and tubes destroyed and the reasonable value thereof; and that this lack of proof regarding value and the uncertainty thereof renders the judgment void.

The Court, in its opinion, fixed the number and value of the tires and tubes destroyed upon the testimony of the witness, Alfred D. McClellan (Tr. p. 74), and the data contained in plaintiff's exhibit No. 3 (Tr. p. 320) and plaintiff's exhibit No. 4. Exhibit No. 3 is a written report from the appellant, Capitol Chevrolet Company, to appellee Defense Supplies Corporation reporting, as agents for Lawrence Warehouse Company, the storer of the tires, the number of tires and tubes destroyed. Capitol now argues that this report made by it is not competent evi-

dence of the facts therein stated. This, we submit, is clearly erroneous.

Capitol claims that the testimony of Mr. McClellan with respect to the number of tires and tubes destroyed and the price paid for such tires and tubes by Defense Supplies Corporation was hearsay, although an examination of the record (Tr. pp. 111 to 131) will show that no objection to this testimony on this ground was interposed at the trial. We submit, therefore, that Capitol's objection, for the first time raised in its brief, comes too late, and that the testimony having been admitted without objection on the ground of hearsay is competent testimony and sufficient to support the judgment.

Diaz v. United States, 223 U. S. 442, 450;
Falk v. Falk, 48 Cal. App. (2d) 762, 789;
1 *Wigmore on Evidence,* Third Edition, 321.

In *Diaz v. United States* (supra), the Court said:

> "So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible." (p. 450.)

Capitol also contends that evidence of the price paid by appellee for the tires and tubes was inadmissible because the price was not a "free market price" but a price fixed by the government as the buyer, and the sale of said tires and tubes to the government at the fixed price was coerced and forced. This is indeed a surprising argument. The true effect of the limitation upon free sale of tires and tubes was to permit the government to purchase at

a price below that which would have existed if there had been a free market, and therefore the appellant was benefited rather than harmed by the use of this arbitrary price in the fixing of value. If it had not been for the government restrictions embodied in the "Idle Tire Program" and the OPA regulations, the value of the tires and tubes destroyed would have been much greater and the damages awarded by the Court would have been proportionately larger.

Capitol also argues that there was uncertainty in the evidence as to the price paid for the tires and tubes because of an alleged discrepancy between the plaintiff's schedule of prices paid and certain OPA price regulations for similar tires. In this connection Capitol, in its brief, refers to the testimony of the witness McClellan appearing at pages 301 to 305 of the transcript. Reference to this testimony will show that the OPA schedules referred to there by Mr. Getz, the attorney for appellant Capitol Chevrolet Company, were never proven to be the schedules of OPA prices in effect at the time the purchases of the tires and tubes were made by the government, and that the prices set forth in plaintiff's exhibit No. 4 (the prices considered by the trial Court in fixing the amount of damages) were without dispute the prices actually paid by appellee for the goods destroyed.

Capitol argues that the value should have been determined by a showing of the reasonable market value immediately prior to the date upon which the "Idle Tire Program" became effective, rather than by the prices actually paid for the goods destroyed. If this procedure

had been followed, it might have resulted in a value actually in excess of the value found by the Court upon the basis of prices paid by the appellee. When the appellee purchased the tires and tubes, the market prices were fixed by OPA schedules then in effect, and these were the prices set forth in appellee's schedule of prices and were the prices paid. We submit that such prices were the best available evidence of value.

The total destruction of the tires and tubes because of the fault of Capitol was the real reason for the uncertainty both as to quantity and value. This uncertainty as to amount is not an obstacle to the allowance of damages. As pointed out by the trial Court in its opinion (Tr. p. 73), "In the case of uncertainty, the most reasonable basis within the boundaries of possibility should be formulated."

Pac. Steam Whaling Co. v. Alaska Packers Association, 138 Cal. 632;

Hanlon D. & S. Co. v. Southern Pac. Co., 92 Cal. App. 230, 235;

Story Parchment Co. v. Paterson, 282 U. S. 555;

Eastman Co. v. So. Photo Co., 273 U. S. 359;

Rilovich v. Raymond, 20 Cal. App. (2d) 630.

An examination of the method of arriving at the value of the goods as set forth by the trial Court in the margin of its opinion will, we believe, show that the trial Court in fact used "the most reasonable basis within the boundaries of possibility". A recitation of the method followed by the trial Court is a sufficient answer to the confused arguments of Capitol. The Court said (Tr. p. 74):

"Graded Tires.

The record (Tr. 22; plaintiff's Exhibit #4, Grade 4) shows that the lowest OPA price for graded tires was $2.75 per tire. (By plaintiff's unacceptable theory of average cost a value of $3.48 per tire was claimed. (Tr. 23.) The price of $2.75 does not in fact represent the lowest price paid by plaintiff for any graded tires, inasmuch as there was deducted from the OPA price on graded used tires 90¢ for each vulcanized spot repair needed and $1.70 for each reinforcement or sectional repair needed. (Plaintiff's Exhibit #4, Grade 4.) Since it is not unreasonable to assume that tire owners turned in under the 'Idle Tire Purchase Plan' their poorest tires, many of such graded used tires must have been purchased by plaintiff at less than $2.75, thus serving to offset to some degree other tires purchased for more than $2.75. These factors would in my opinion reasonably tend to equalize the difference in price to such an extent that a value of $2.75 per tire may be fixed as a fair and reasonable value of the graded tires destroyed.

Scrap Tires.

No difficulty presents itself as to scrap tires, since plaintiff paid 20¢ each for all tires of this kind.

Graded Tubes.

Likewise appraisement of value here is free of difficulty for the reason that the lowest OPA price for a sound or repaired used tube was $1.50. (Plaintiff's Exhibit #4, Table VI.) Coincidentally this is average cost per plaintiff's theory.

Scrap Tubes.

There is evidence neither of any OPA price scrap tubes nor of the price paid by plaintiff, but plaintiff

> claims a value of 20¢ each. Since graded tubes appear to carry a value of 55% of the value of graded tires, it is fair [and] reasonable to conclude that a similar ration of value obtained in the case of scrap tires and tubes. Consequently the value of the scrap tubes is fixed at 11¢ each."

It should be remembered in this case that it was the wrongful act of the appellants which resulted in the destruction of the property of the appellee and of all the evidence from which the actual value of that property could be ascertained. Where this is true, the presumption is that said property is of the highest value that can reasonably be estimated.

Armory v. Delamirie, 1 Strange 504, 1 Smith's Leading Cases 679;

Fox v. Hale & Norcross S. M. Co., 108 Cal. 369, 415;

2 *Sutherland* (4th ed.) 1414-15;

4 *Sutherland* (4th ed.) 4224-25.

Where there is no doubt that the plaintiff has suffered damage and the only question is the amount of damage suffered, the Court should apply a liberal rule in calculating the amount and plaintiff's recovery is not limited to so much of the damage as can be calculated with certainty.

25 *C. J. S.* 494-6, 815;

Hanlon D. & S. Co. v. Southern Pac. Co., 92 C. A. 230, 235;

Pye v. Eagle Lake Lumber Co., 66 C. A. 584;

Larson v. Union Investment & Loan Co., 10 P. (2d) 557 (Wash.);

78 *A. L. R.* 858, note.

This is particularly true where the wrong itself renders proof of the amount of damage difficult. In such a case, the defendant cannot escape making proper amends where he is responsible for the difficulty.

Seymour v. Oelrichs, 156 Cal. 782, 803;

Hacker, etc. Co. v. Chapman V. Mfg. Co., 17 C. A. (2d) 265, 272;

California Orange Co. v. Riverside P. C. Co., 50 C. A. 522;

Story Parchment Co. v. Paterson Co., 282 U. S. 555, 75 L. ed. 544;

Sauntry v. U. S., 117 Fed. 132 (C. C. A. 8).

This rule applies to a case where the property sought to be valued is of various grades and plaintiff is unable to show with certainty the amount of each grade.

Pye v. Eagle Lake Lumber Co., supra, at page 591.

In view of the above rules, we submit that the Court did not err in either the admissibility of testimony with respect to damages nor in fixing the amount thereof upon the basis of the testimony that was admitted. On the contrary, it may well be argued under the state of the law as recited above, that the Court should, in this case, have taken not the lowest price for graded tires, but an average price or the highest price.

ARGUMENT ON CASE AGAINST LAWRENCE WAREHOUSE COMPANY.

1. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING OF NEGLIGENCE ON THE PART OF LAWRENCE.

As heretofore shown, appellant Capitol Chevrolet Company was acting as agent of appellant Lawrence Warehouse Company for the storage of the tires and tubes of appellee. Lawrence as principal is therefore liable to appellee for the negligence of its agent in the transaction of the business of the agency.

Cal. Civil Code, Sec. 2338.

Our remarks concerning the liability of Capitol are pertinent here for if Capitol is liable to appellee then Lawrence can not escape. In order to avoid repetition we refer the Court to our argument on the case against Capitol set forth above.

The liability of Lawrence to appellee is also predicated on the contractual relationship between Lawrence and appellee. The contract of storage contained the following provision: "Your (Lawrence's) general responsibility for the care and protection of the tires will be limited to such care as is required by laws governing warehouses in your state and to the exercise of ordinary care on your part." (Tr. p. 314.)

A warehouseman is liable for the loss of the property of the bailor by fire unless the warehouseman exercises reasonable care and diligence for the protection and preservation of the property.

Cal. Civil Code, Sec. 1858e;

California Warehouse Receipts Act, Sec. 21, *Deering's General Laws,* Act 9059.

In the present case Lawrence, through its agent Capitol Chevrolet Company, permitted the use of an acetylene torch on the warehouse premises contrary to express instructions of appellee and in spite of the fact highly inflammable goods were stored therein. What precautions, if any, were taken against the fire by Lawrence has not been shown. Lawrence and its agent were clearly negligent and responsible for the loss of appellee's tires and tubes.

Lawrence, in its brief under the heading "The Liability of Lawrence", makes certain statements of fact which it claims are admitted facts, without reference to the record. In order to avoid any misunderstanding, we wish to point out that certain of the purported facts there stated are stated in such a way as to be misleading, and as so stated are not supported by the evidence and have not been admitted by appellee. For instance, on page 7 of its brief, Lawrence states that it had no active part in the conduct of the warehouse and was not represented at the warehouse by any employee except the watchmen. The evidence does not disclose whether or not any employees or officers of Lawrence took any active part in the operation of the warehouse. This, however, is immaterial in view of the fact that the warehouse was under the control of the agent of Lawrence. If in fact Lawrence never inspected the operations of the warehouse, this would be a factor indicating negligence on its part but could not relieve it of liability for the negligence of its agent.

Lawrence further states, on page 7 of its brief, that Capitol received instructions directly from appellee. This is directly contrary to the evidence which shows that

written instructions regarding storage of the goods were delivered to Lawrence at the time of the execution of the storage agreement. (Tr. p. 105.) There was evidence that appellee gave Capitol written instructions regarding the admission of persons to the premises (Tr. pp. 191-192), but similar instructions were given at the same time to Lawrence. (Tr. pp. 205-206.)

Lawrence next states in its brief that the list of persons who could be admitted to the premises did not include any of its officers or employees. The list, however, did include officers and employees of its agent Capitol Chevrolet Company, and there is no evidence that the list was intended to exclude representatives of Lawrence.

It is also stated by Lawrence that the choice of the Burns Detective Agency was made by appellee. This is directly contrary to the fact. Lawrence's own counsel stated at the trial that appellee requested guard service but did *not* prescribe any particular guard. (Tr. p. 286.) In this connection, it may be remarked that the argument that because Lawrence, as principal, supplied its agent with watchmen it is therefore relieved from liability for the acts of its agent, is indeed a novel one and as far as we know is supported by no authorities.

The argument of Lawrence on the question of the sufficiency of the evidence, although not entirely clear, appears to be based on the proposition that there are no proven facts from which an inference of negligence can be drawn. We believe we have heretofore adequately shown in our argument on the case against Capitol that there is substantial evidence of negligence. Tires and tubes were stored in a frame building and a workman was

permitted to enter to use an acetylene torch. The only fire-fighting equipment available and used was a 5-gallon bucket of water. (Tr. p. 219.) There was no evidence of any other precautionary measures taken by the warehouseman. We refer again to the case of *Runkel v. Southern Pacific Milling Co.,* 184 Cal. 714, which involved very similar circumstances and where the Court held that the verdict of the jury against the warehouseman must be upheld. We also refer again to that case in answer to the contention of Lawrence that appellee's knowledge of the operation of the warehouse should relieve Lawrence of liability. (See brief of Lawrence, pp. 11-12.) As heretofore pointed out, the Court in the *Runkle* case held that such knowledge does not absolve the warehouseman.

2. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING THAT THE DAMAGE WAS PROXIMATELY CAUSED BY THE NEGLIGENCE OF LAWRENCE.

The argument of Lawrence in this connection is based on the contention that the act of McGrew in using the torch was an intervening cause which broke the chain of causation and that, therefore, Lawrence can not be liable. In support of this contention, Lawrence relies on a decision of the Supreme Court of Arizona. (*Salt River Valley Water Users Association v. Cornum,* 63 Pac. (2d) 639.) It is submitted that the law on this subject is so well settled in California that there can be no doubt as to how it stands. There are numerous decisions of our Supreme Court and District Courts of Appeal to the effect that two or more defendants may be liable for an injury caused by their separate negligent acts, where the negligence of each was a proximate cause of the injury. (See 19 *Cal. Juris.* 572 and cases there cited.)

A few of the more recent decisions of our Supreme Court may be referred to.

In *Taylor v. Oakland Scavenger Co.,* 17 Cal. (2d) 594, the Court was concerned with the following situation:

The plaintiff, a school girl, was struck by a truck while she was crossing a street adjacent to the school grounds. Plaintiff sued the truck driver and owner and the School District, contending that the truck was negligently operated and that the employees of the School District were also negligent in not taking proper precautions for the safety of the child. The jury awarded damages against all defendants and this was affirmed by the Supreme Court. In the course of its opinion, the Court said (p. 602):

> "The school district maintains, however, that any breach of duty on the part of its employees was not a proximate cause of the injury to plaintiff because the negligence of the truck driver was an efficient intervening cause. Conversely, the Santuccis and the Scavenger Company contend that any breach of duty on the part of the truck driver was not a proximate cause of the injury because the negligence of the school authorities was an efficient intervening cause. If an injury is produced by the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury, and neither can operate as an efficient intervening cause with regard to the other. (Citing cases.) The fact that neither party could reasonably anticipate the occurrence of the other concurrent cause will not shield him from liability so long as his own negligence was one of the causes of the injury. (Citing cases.) The arguments of defendants themselves make clear that more than one

conclusion may reasonably be drawn from the conflicting evidence of this case, and the determination of the jury that the negligence of each defendant contributed concurrently to the plaintiff's injury cannot therefore be disturbed on appeal."

In the present case the trial Court has found that both the negligence of the warehouseman in not taking proper precautions and the negligence of McGrew in using the torch contributed to the loss, and that each was a proximate cause of the loss. (Tr. pp. 78 to 81.) These findings are supported by the evidence and must stand. Since both the warehouseman and McGrew contributed to the loss, both are liable. See also the following recent decisions which are in accord with the *Taylor* case:

Mosley v. Arden Farms, 26 Cal. (2d) 213;

Westover v. City of Los Angeles, 20 Cal. (2d) 635.

ARGUMENT ON CASE AGAINST V. J. McGREW.

1. THIS COURT HAS NO JURISDICTION OVER THE APPEAL OF McGREW.

Appellant V. J. McGrew's appeal from the judgment against him was filed too late and this Court, therefore, has no power to hear the appeal. The judgment against McGrew was entered on April 15, 1946 (Tr. pp. 83 to 85) and he filed his notice of appeal on July 16, 1946. (Tr. p. 96.)

An appeal must be filed within three months of entry of the judgment and failure to do so is jurisdictional and

deprives the Circuit Court of Appeals of power to hear the appeal.

28 *U. S. C. A.*, Sec. 230;

10 *Cyc. of Federal Procedure*, Sec. 5176.

Here McGrew has filed his appeal one day late.

In a case where the judgment was entered on March 17, 1934, and the appeal was filed on June 18, 1934, the Court dismissed the appeal because the three-month period had elapsed.

Walters v. Balt. & Ohio Railroad Co., 76 Fed. (2d) 599.

2. **THERE IS SUBSTANTIAL EVIDENCE THAT McGREW CAUSED THE FIRE BY THE NEGLIGENT USE OF THE ACETYLENE TORCH.**

Even though we believe that this Court can not hear the appeal of McGrew, we will remark briefly on the issue raised by this appellant as it may aid the Court in its determination of the case as a whole. McGrew in his brief speaks of the insufficiency of the evidence in general, but it will be noted that he relies principally on the contention that the evidence is insufficient to support a finding that the torch caused the fire.

The only eye witness to the start of the fire was McGrew, a witness adverse to appellee. McGrew humanly enough did not admit on the stand that his torch set the fire. Nevertheless, his testimony can give rise to no other conclusion.

McGrew was alone in the engine room when the fire started and he first observed the fire shortly after he had

been using the torch. (Tr. pp. 220-221.) He testified that when he first saw the fire it was between the brine tank which he had been cutting and the south wall of the building, a distance of less than six feet from the place where he had last used the torch. (Tr. pp. 221-222.) He could offer no other explanation for the fire and no evidence of any other possible cause was produced. It should also be noted that the guard Kissell saw McGrew shortly after he had reported the fire and testified to a conversation with McGrew in which the latter admitted that the fire started where he had been cutting the tank with the torch. Kissell testified as follows (Tr. p. 284):

> "A. I don't remember just exactly the words he used, but he said he hated to see the place burn down, it was quite a mess.
>
> Q. Did he say anything else?
>
> A. So I said, 'It sure is.' Then he told me that he was the man that was working there, and I said 'Were you?' and he said, 'Yes.' And I said, 'I wonder how that thing got started.' And he said, 'Well, it looks to me like it started there, right where I was cutting or close to where I was cutting with the torch,' as near as he could tell."

In addition, we wish to point to the following testimony:

1. That there was something on the floor underneath the tank but McGrew "didn't check into the thing." (Tr. p. 224.)

2. That McGrew did not know whether or not the tank was set on cork covered with asphalt and tar. (Tr. p. 232.)

3. That while the men were using the torch prior to the fire, the guard Kissell saw some "dark material" just under the edge of the tank. (Tr. p. 281.)

We do not think that it is too much to contend that McGrew should have inspected the area underneath the tank or that it is unreasonable to state that merely throwing two buckets of water under the tank some ten minutes prior to observing the fire is not a sufficient precautionary measure.

The use of an acetylene torch close to inflammable materials is evidence of negligence, and in the absense of a showing by the defendant that reasonable precautions were taken to prevent the outbreak of fire, judgment must be given for the plaintiff.

Reliance Insurance Co. v. Pohlking, 19 N.E. (2d) 906 (Ohio).

When the thing which causes the damage is under the management and control of the defendant and the accident is such as in the ordinary course of events does not happen if proper precautions are taken, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

Gerhart v. Southern Cal. Gas Co., 56 Cal. App. (2d) 425;

White v. Spreckels, 10 Cal. App. 287, 101 Pac. 920;

Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020;

19 *Cal. Jur.* 704, et seq.

McGrew argues that the doctrine of *res ipsa loquitur* does not apply because there has been no showing that the acetylene torch caused the fire. As pointed out above,

there can be no doubt of the fact that the fire was set by the torch. We do not believe that appellee has the burden of eliminating all other possible causes.

McGrew cites the case of *Bartholomai v. Owl Drug Co.*, 42 Cal. App. (2d) 38 as being controlling here. In this connection the trial Court in its opinion stated as follows (Tr. pp. 65-66):

> "I do not feel bound to follow the cited case of Bartholomai v. Owl Drug Co., 42 Cal. App. (2d) 38, inasmuch as it fails to recognize the existence of a duty upon the part of a person using an instrumentality capable of igniting combustible material to ascertain the presence of such material nearby and to safeguard against its ignition. The case of Wilson v. Southern Pacific R. R. Co., 62 Cal. 164, appears to me to be in point and persuasive against defendant's contention."

We believe the opinion of the trial Court is sound. Furthermore, the *Bartholomai* case differs from the present one in several material respects:

1. In the *Bartholomai* case the workman was standing on a platform some distance above a temporary floor and the fire started beneath the floor.

2. In the *Bartholomai* case there were other persons present near the place where the fire started.

3. The Court in the *Bartholomai* case affirmed the judgment of the trial Court. Thus, even though the facts were sufficient to raise an inference of negligence, the Appellate Court could not reverse the lower Court inasmuch as the evidence was also susceptible of the inference that the defendant was not negligent.

CONCLUSION.

In conclusion, it is submitted that there is ample evidence to support the findings of the trial Court that the loss of appellee's tires and tubes was caused by the negligence of appellants, and the judgment of the trial Court against the appellants should therefore be affirmed.

Dated, San Francisco, California,
August 12, 1947.

Respectfully submitted,
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